

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
KANSAS CITY DIVISION**

ROBERT CAMPO,
Plaintiff

v.

U.S. DEPARTMENT OF JUSTICE,
Defendant

Case No. 4:19-cv-00905

COMPLAINT

I. JURISDICTION AND VENUE

1. This action arises under a federal statute, the Freedom of Information Act (“**FOIA**”), 5 U.S.C. § 552, as amended, which is one section of the Administrative Procedure Act (“**APA**”), 5 U.S.C. § 551 *et seq.*, as amended. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B); L.R. 3.2(a)(1)(B).

II. PARTIES

2. Plaintiff, Robert Campo (“**Plaintiff**”), maintains his primary residence in Jackson County at 10606 Askew Avenue, Kansas City, Missouri 64137.

3. Defendant, the United States Department of Justice (“**DOJ**”), is a department or agency within the executive branch of the United States government. The Executive Office for United States Attorneys (“**EOUSA**”) is a component of the DOJ. At all relevant times, the DOJ Civil Division Chief in Washington D.C. was not within the Washington, D.C. EOUSA.

III. FOIA REQUESTS AND DENIALS

4. On February 19, 2019, the U.S. Department of Justice (“**DOJ**”) received a written request from Plaintiff by e-mail at MRUFOIA.REQUESTS@USDOJ.GOV asking the DOJ to release certain records in compliance with the Freedom of Information Act (“**FOIA**”). The DOJ

sent Plaintiff a letter dated February 22, 2019 stating that the DOJ Office of Information Policy (“OIP”) received Plaintiff’s FOIA request and had assigned the number **DOJ-2019-002505** to it (“**Request 2505**”). The DOJ also referred to Request 2505 using a different number (**EOUSA-2019-001917**), which was assigned by the DOJ Executive Office for United States Attorneys (“**EOUSA**”).

5. Request 2505 described certain records as emails sent by Darin Powers on July 30, 2013 with the subject “WPS – next steps & actions” (“**Powers’ emails**”) that were at issue in three cases involving attorneys employed by the U.S. Department of Justice: *Jordan v. U.S. Dep’t of Labor*, (D.D.C. No. 1:16-cv-01868-RC) (and the related appeal to the D.C. Circuit No. 18-5128); *Jordan v. U.S. Dep’t of Justice*, (D.D.C. No. 1:17-cv-02702-RC); *Jordan v. U.S. Dep’t of Labor*, (WDMO No. 5:18-cv-06129-ODS).

6. Request 2505 stated that the signature pages of court filings by the DOJ pertaining to Powers’ email contained signature blocks of “the local U.S. Attorney, one or more Deputy or Assistant U.S. Attorneys, and the local Civil Division Chief.”

7. Request 2505 asked the DOJ to “promptly email” to Plaintiff “an electronic (PDF) copy of any record maintained by the DOJ” that satisfies the following criteria (each a “**Requested Record**”): “a copy of Powers’ emails in any form that was transmitted to or from any DOJ employee by any person at any time in or after June 2016 along with any record establishing the date or manner of such transmission.”

8. On May 30, 2018, the DOJ had emailed to Plaintiff’s counsel a copy of records that included Powers’ email with all text in or on Powers’ email redacted (the “**Redacted Records**”), which is attached hereto as Exhibit 1. The Redacted Records also included an email sent by Robert Huber at about 8:20 a.m. July 31, 2013, with the subject “WPS – next steps &

actions” (“**Huber’s email**”).

9. Throughout July 2013, Darin Powers and Robert Huber were employees of DynCorp International LLC (“**DI**”). On July 30 and 31, 2013, DI’s principle offices were located in Virginia. On July 30, 2013, Powers’ emails were sent to five recipients, and on July 31, 2013, Huber forwarded his copy of Powers’ email to an additional recipient as an attachment to Huber’s email (each a “**Recipient**”).

10. Upon information and belief, at least five Recipients were not admitted to any bar on or before July 31, 2013. Upon information and belief, as of July 31, 2013, no Recipient was admitted to the bar of the Commonwealth of Virginia.

11. Upon information and belief, in Powers’ emails, Powers did not ask any Recipient to provide any advice regarding any issue of law. Upon information and belief, in Powers’ emails, Powers did not include the noun “advice” or any form of such word. Upon information and belief, in Powers’ emails, Powers did not include the verb “advise” or any form or tense of such word. Upon information and belief, no Recipient sent any email to Powers providing any advice regarding any issue of law in response to Powers’ emails. Upon information and belief, Powers’ emails did not ask any Recipient to provide any information to any attorney. Upon information and belief, in Powers’ emails, Powers did not expressly ask Christopher Bellomy to do anything that Powers did not ask any other Recipient to do.

12. At all relevant times since at least January 2015, Larry S. Merck (“**ALJ Merck**”) has been employed as a U.S. Department of Labor (“**DOL**”) Administrative Law Judge (“**ALJ**”) in Washington, D.C. From at least January 2015 through November 29, 2017, ALJ Merck presided over DOL ALJ Case No. 2015-LDA-00030 (the “**DBA Case**”). In a written opinion issued February 9, 2016 in the DBA Case, ALJ Merck represented based on his personal

knowledge that *both* Huber’s email and Powers’ emails “expressly sought legal advice.” ALJ Merck *knowingly* misrepresented that Huber’s email “expressly sought legal advice.” ALJ Merck *knowingly* misrepresented that Powers’ emails “expressly sought legal advice.”

13. On October 28, 2015, DI’s counsel in the DBA Case sent a letter for filing in the DBA Case (the “**DI’s Letter**”). *See* Exhibit 2 hereto. DI’s Letter was addressed to DOJ ALJ Larry Merck and to the “Chief Docket Clerk.” DI’s Letter, along with an unredacted copy of Powers’ emails and Huber’s emails, was hand delivered to the OALJ on October 28, 2015. DI’s Letter revealed and represented that Powers’ emails bore the “notation ‘Subject to Attorney Client Privilege.’” DI’s Letter also revealed and represented that Powers’ emails were sent to multiple “DI employees with responsibility for the administration and management of the WPS Program contract” for one purpose: to “apprise” them of “developments potentially impacting the contract.”

14. In a public submission to the DOL’s Benefits Review Board on January 16, 2018 in the DBA Case, DI’s counsel represented that the “privileged portion of the email thread” “contains an express request for legal advice.” *See* Exhibit 3 hereto, page 7. DI was referring specifically to Huber’s emails and Powers’ emails. *See id.* at 1 and at 7 citing ALJ Merck’s decision dated February 9, 2016.

15. In 2016, the DOL sent Huber’s email and Powers’ emails to the Washington, D.C. EOUSA. The DOL sent Huber’s email and Powers’ emails to the DOJ for the purpose of helping the DOL conceal *evidence* that ALJ Merck *knowingly* misrepresented that Huber’s email and Powers’ email “expressly sought legal advice.”

16. An attorney in the Washington, D.C. EOUSA, Jason Cohen (“**Cohen**”), signed and filed in D.C. District Court in December 2016 a motion for summary judgment in which he

represented that Huber's email *and* Powers' email "explicitly request" an "attorney's input and review" and Huber's email *and* Powers' email were marked "Subject to Attorney Client Privilege." The only attorney to which that contention referred was Christopher Bellomy (**"Bellomy"**).

17. In 2018, Cohen signed and filed multiple papers in the D.C. Circuit Court of Appeals in which Cohen represented that Powers' email is labeled "subject to attorney-client privilege," and it contains an "explicit" or "express" "request for legal advice."

18. DOJ Senior Attorney Todd Smyth (**"Smyth"**) provided evidence contradicting the contentions by DI's counsel (in paragraph 13) and Cohen (in paragraph 17) that Powers stated "an express request for legal advice" in his emails. Smyth signed a declaration dated December 21, 2016 declaring that Powers' emails "expressly" requested "input and review" and were marked "Subject to Attorney Client Privilege." Smyth's declaration also declared that Huber's email "expressly" requested "input and review" and was marked "Subject to Attorney Client Privilege."

19. Upon information and belief, in Powers' email, Powers did not include the noun "advice" or any form of such word. Upon information and belief, in Powers' email, Powers did not include the verb "advise" or any form or tense of such word. Upon information and belief, in Powers' email, Powers did not expressly ask Bellomy to do anything that Powers did not ask any other Recipient to do.

20. On August 15, 2017, Robert Huber signed a declaration declaring that he was DI's "Senior Contracts Director" in July 2013, and he "advised DI management regarding its rights and obligations under the WPS Program contract." Huber's declaration declared that Huber received Powers' email to help DI prepare to negotiate payment to DI of amounts that had

been “short paid” regarding particular “invoices” that DI had submitted to the U.S. Department of State in connection with DI’s WPS contract. *See* Exhibit 4 hereto.

21. Upon information and belief, in the DBA Case, DI filed hearing exhibits that publicly disclosed information that was included in Powers’ emails. Before November 9, 2019, no DOJ employee compared any information in Powers’ emails to information that DI disclosed in any of DI’s hearing exhibits numbered 26, 27, 34-36 or 39-42.

22. Upon information and belief, before November 9, 2019, no DOJ employee compared any information in Powers’ email with any public disclosure by DI and concluded that such information in Powers’ email had not been publicly disclosed by DI.

23. On February 27, 2019, the DOJ sent Plaintiff an email expressly denying Request 2505 (the “**February 27 Denial**”) with respect to Powers’ emails. Upon information and belief, at least one attorney employed by the DOJ’s EOUSA was at least partially responsible for causing the EOUSA to issue the February 27 Denial.

24. Before November 9, 2019, the DOJ failed to provide the name and title or position of (“**Identify**”) *each* DOJ employee who was responsible for making any determination stated in the February 27 Denial. Before November 9, 2019, the DOJ failed to Identify *any* DOJ employee who was responsible for making any determination stated in the February 27 Denial.

25. The OIP sent Plaintiff’s counsel a letter dated July 2, 2019 in which the OIP included the following statement: “Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your client's underlying request, and the action of EOUSA in response to your client's request.” But the OIP failed to Identify such attorney.

26. The February 27 Denial included the following statement: “Since you have not

furnished a release, death certificate, or public justification for release, the release of records concerning a third party would result in an unwarranted invasion of personal privacy and would be in violation of the Privacy Act, 5 U.S.C. § 552a.” The OIP’s July 2, 2019 Letter included the following statement: “To the extent that non-public responsive records exist, disclosure of such records concerning a third-party individual would constitute a clearly unwarranted invasion of personal privacy, and could reasonably be expected to constitute an unwarranted invasion of personal privacy.” Before November 9, 2019, the DOJ failed to Identify any DOJ employee who determined that any portion of either of the foregoing statements applied to Request 2505. Upon information and belief, before November 9, 2019, no DOJ employee determined that any portion of Powers’ email or any other Requested Record was “non-public.” Upon information and belief, before November 9, 2019, no DOJ employee determined that any portion of Powers’ email or any other Requested Record concerned any third-party individual. Upon information and belief, before November 9, 2019, no DOJ employee determined that release of any portion of Powers’ email or any other Requested Record would invade any individual’s personal privacy. Upon information and belief, before November 9, 2019, no DOJ employee determined that release of any portion of Powers’ email or any other Requested Record would invade any individual’s personal privacy to an unwarranted extent.

27. The February 27 Denial included the following statement: “These records are also generally exempt from disclosure pursuant to sections (b)(6) and (b)(7)(C) of the Freedom of Information Act, 5 U.S.C. § 552.” Before November 9, 2019, the DOJ failed to Identify any DOJ employee who was responsible for determining that any element of FOIA Exemption 6 or Exemption 7(C) applied to Request 2505. Upon information and belief, before November 9, 2019, no DOJ employee determined that *any* element of FOIA Exemption 6 or Exemption 7(C)

applied to Request 2505. Upon information and belief, before November 9, 2019, no DOJ employee determined that *each* element of FOIA Exemption 6 or Exemption 7(C) applied to Request 2505.

28. Before November 9, 2019, the DOJ failed to Identify any DOJ employee who was responsible for determining that any portion of any Requested Record was transmitted to the DOJ for any law enforcement purpose. Upon information and belief, before November 9, 2019, no DOJ employee determined that any portion of any Requested Record was transmitted by the DOL to the DOJ for any law enforcement purpose. Upon information and belief, before November 9, 2019, no DOJ employee determined that all Requested Records constituted investigatory records concerning any third party.

29. Before November 9, 2019, the DOJ failed to Identify any DOJ employee who was responsible for determining that any portion of Powers' email fell within any FOIA exemption.

30. Upon information and belief, before November 9, 2019, no DOJ employee determined that any portion of any Requested Record contained any private information belonging to any individual. Upon information and belief, before November 9, 2019, no DOJ employee determined that any Requested Record constituted a personnel or medical file. Upon information and belief, before November 9, 2019, no DOJ employee determined that any Requested Record was exempt in accordance with *FCC v. AT & T Inc.*, 562 U.S. 397 (2011).

31. Upon information and belief, before November 9, 2019, no DOJ employee determined that any portion of Powers' email was communicated to any Recipient for any purpose that might qualify such information for protection under the attorney-client privilege consistent with any requirement stated in *Fisher v. United States*, 425 U.S. 391 (1976), *Diversified Industries, Inc. v. Meredith*, 572 F.2d 606 (8th Cir. 1978) (*en banc*) *aff'g* 572 F.2d

596 (1977) or *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014).

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

32. By letter dated February 22, 2019, the OIP stated that it forwarded Request 2505 only to the EOUSA for further processing. By the OIP's February 22 letter, the OIP issued a Denial of Request 2505 with respect to any DOJ component other than the EOUSA. Upon information and belief, no DOJ component other than the EOUSA conducted any search for any record that might be responsive to Request 2505.

33. On February 27, 2019, the DOJ sent Plaintiff the February 27 Denial. The February 27 Denial did not mention any Requested Record other than Powers' emails. Upon information and belief, the EOUSA did not conduct any search for any record other than Powers' emails that might be responsive to Request 2505.

34. On March 21, 2019, Plaintiff's counsel submitted a letter to the DOJ OIP by U.S. mail to appeal the February 27 Denial and the DOJ's failure to search for any records other than those maintained by the EOUSA.

35. By letter dated July 2, 2019, the OIP sent Plaintiff's counsel a letter "affirming EOUSA's action" with respect to Request 2505. The July 2 letter did not mention any failure to search for any records other than Powers' email or to search any records other than those of the EOUSA. The July 2 letter included the following statement: "Because any non-public records responsive to your client's request would be categorically exempt from disclosure, EOUSA properly asserted these exemptions and was not required to conduct a search for the requested records."

CAUSES OF ACTION

COUNT I

Violation of FOIA, 5 U.S.C. §§ 552(a)(3)(A) and 552(d)

36. Plaintiff realleges and incorporates by reference paragraphs 1 through 35 of this Complaint as if fully stated herein.

37. The DOJ failed to “make” each Requested Record and all reasonably segregable information therein “promptly available” to Plaintiff “except” to the extent FOIA “specifically stated” that the DOJ was authorized to fail to do so.

COUNT II

Violation of FOIA, 5 U.S.C. §§ 552(a)(8)(A)(i) and 552(d)

38. Plaintiff realleges and incorporates by reference paragraphs 1 through 37 of this Complaint as if fully stated herein.

39. The DOJ withheld Requested Records or segregable information therein even though no DOJ employee “reasonably” foresaw that disclosure of each such record or information would harm any interest protected by” a FOIA “exemption” or “disclosure is prohibited by law.”

COUNT III

Violation of FOIA, 5 U.S.C. §§ 552(a)(8)(A)(ii), 552(b) and 552(d)

40. Plaintiff realleges and incorporates by reference paragraphs 1 through 39 of this Complaint as if fully stated herein.

41. The DOJ failed to “take reasonable steps necessary to segregate and release nonexempt information” in each Requested Record. The DOJ failed to provide to Plaintiff any “reasonably segregable portion” of any Requested Record “after deletion of the portions which are exempt.”

42. The segregable portions of Powers' emails that the DOJ was required to release included any privilege notation and any non-commercial words in any express request for advice, input or review, which ALJ Merck, DI and Cohen publicly revealed and represented (*see* paragraphs 12, 13, 14, 16 and 17, above) were included in or on Powers' emails.

COUNT IV
Violation of FOIA, 5 U.S.C. §§ 552(a)(3)(C) and 552(d)

43. Plaintiff realleges and incorporates by reference paragraphs 1 through 42 of this Complaint as if fully stated herein.

44. The DOJ failed to search for one or more Requested Records. The DOJ failed to "make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system."

COUNT V
Violation of FOIA, 5 U.S.C. §§ 552(a)(6)(C)(i) and 552(d)

45. Plaintiff realleges and incorporates by reference paragraphs 1 through 44 of this Complaint as if fully stated herein.

46. The DOJ failed to cause each "notification of denial of any request for records" to "set forth the names and titles or positions of each person responsible for the denial of such request."

VI. PRAAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief from this Court:

A. Injunctive relief ordering the DOJ to email to Plaintiff within two business days any copy of Powers' emails located in any EOUSA office in Washington, D.C., Kansas City, Missouri, or Brooklyn, New York without any redaction or modification thereto;

B. Injunctive relief ordering the DOJ to conduct and complete within 14 days a search for all Requested Records maintained by any EOUSA office, as well as any component within which a Civil Division Chief is located, in Washington, D.C., Kansas City, Missouri, or Brooklyn, New York;

C. Injunctive relief ordering the DOJ to release to Plaintiff within 21 days all Requested Records other than Powers' emails, redacted and marked, if at all, in a manner that fully complies with FOIA;

D. Judgment for reasonable attorneys' fees, expenses, and costs;

E. Equitable relief including issuance of a written finding that the circumstances surrounding the actions of each DOJ employee who was responsible for asserting any statement in either the February 27 Denial or the OIP's July 2, 2019 letter to justify withholding or failing to search for any Requested Record raises questions whether such DOJ employee acted arbitrarily or capriciously in causing or contributing to the withholding of any portion of any Requested Record or any failure to search for any Requested Record.

Date: November 9, 2019

Respectfully Submitted,
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